RECORD AND BRIEF.

No. 16-980

Supreme Court, U.S.
FILED
AUG - 7 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS AND LARRY HARMON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF FORMER ATTORNEYS OF THE CIVIL RIGHTS DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Amici Curiae

August 7, 2017

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

IDENTITY & INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Sixth Circuit's interpretation of the NVRA is incorrect and contradicts the Justice Department's longstanding enforcement policy 6

A. The Sixth Circuit's interpretation of the NVRA conflicts with the law's text, structure, and history 6

B. The Sixth Circuit's decision contradicts the Justice Department's longstanding interpretation of the NVRA 13

II. The Sixth Circuit's decision will undermine the states' efforts to maintain accurate voter rolls and to promote the integrity of elections 15

CONCLUSION 21

APPENDIX — GRID OF POTENTIAL DUPLICATE REGISTRANTS WITHIN STATES BY DOB 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Alden v. Maine,
527 U.S. 706 (1999) 8

Arizona v. Inter Tribal Council of Ariz., Inc.,
133 S. Ct. 2247 (2013) 4

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) 11-12

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) 15

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 12

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 12

Purcell v. Gonzalez,
549 U.S. 1 (2006) 15

Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.,
523 U.S. 135 (1998) 11

Rodriguez v. United States,
480 U.S. 522 (1987) 12

Cited Authorities

Page

United States v. Atl. Research Corp.,
551 U.S. 128 (2007).....11

United States v. City of Philadelphia,
No. 2:06-cv-4592, 2007 WL 1476781 (E.D. Pa. Apr. 26, 2007) 13, 14

United States v. Indiana,
No. 1:06-cv-1000 (S.D. Ind., June 27, 2006).....14

United States v. Pulaski County,
No. 4:04-cv-389 (E.D. Ark. Apr. 19, 2004).....14

STATUTES AND OTHER AUTHORITIES

52 U.S.C. § 20501(b).....6, 12

52 U.S.C. § 20501(b)(3)-(4) 15

52 U.S.C. § 20507(a)(3)-(4).....11

52 U.S.C. § 20507(a)(4)(B).....6, 12

52 U.S.C. § 20507(b)(2) 7, 8, 11, 12

52 U.S.C. § 20507(d) 7

52 U.S.C. § 20507(d)(1) 11

Cited Authorities

Page

52 U.S.C. § 20507(d)(1)(B) 7, 12

52 U.S.C. § 21083(a)(4)(A) 9, 12

H.R. Rep. No. 103-9 ..... 6, 9, 11

S. Rep. No. 103-6 ..... 6, 9, 11, 15

Sup. Ct. R. 37.6 1

America The Vulnerable: The Problem of Duplicate Voting, Government Accountability Institute (2017) 20

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 12

Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005) 15, 16

Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated July 2017) 19

Kan. Sec'y of State, *Grid of Potential Duplicate Registration Within States by DOB* (2017) 18

Kris W. Kobach, *Presentation on Interstate Voter Registration Crosscheck Program to Nat'l Ass'n of State Election Directors* (Jan. 26, 2013) 19

Cited Authorities

Page

Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (2012) 16

U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* (2009).....16, 21

IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are six former attorneys of the Civil Rights Division of the United States Department of Justice:

1. Colonel Karl S. "Butch" Bowers is the State Staff Judge Advocate for the Joint Force Headquarters, South Carolina Air National Guard, and a lawyer in private practice, focusing on governmental and legislative affairs, campaign finance and election law, and regulatory matters. In 2007-08, Col. Bowers was appointed by President George W. Bush as Special Counsel for Voting Matters at the U.S. Department of Justice. He also has served as the Staff Judge Advocate for the 169th Fighter Wing, as the Chairman of the South Carolina Election Commission, and as a JAG officer. Col. Bowers earned a J.D. from Tulane Law School, a M.P.A. from the College of Charleston, and a B.A. from the University of South Carolina.

2. Christopher Coates is the former General Counsel for the American Civil Rights Union. He worked in the Voting Section of the Justice Department from 1996-2010. During ten of those years, he worked in a supervisory or management position, and during two of those years he was the Chief of the Voting Section. He earned the Walter W. Barnett Memorial Award in 2007, the Civil Rights Division's second highest award for excellence in advocacy. From 1985-96, Mr. Coates was an attorney with

---

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

the Voting Rights Project of the American Civil Liberties Union. In 1991, he was awarded the Thurgood Marshall Decade Award by the Georgia NAACP for his work in voting rights and civil rights law. He is a graduate of the University of North Carolina at Chapel Hill and the University of North Carolina School of Law.

3. Christy McCormick has worked in voting and elections for over 25 years, starting out as an assistant voter registrar in Connecticut in 1988. She is currently a Commissioner on the Presidential Commission on Election Integrity. She is also a Commissioner on and former Chair of the U.S. Elections Assistance Commission (EAC). Prior to the EAC, she was a Senior Trial Attorney in the Voting Section of the Department of Justice's Civil Rights Division for eight years. During 2009-10, she was detailed by the Deputy Attorney General to the U.S. Embassy in Baghdad to work on the Iraq national elections and rule-of-law matters. Previously, she clerked for Justice Elizabeth A. McClanahan on the Court of Appeals of Virginia. She also served as an Assistant Solicitor and Assistant Attorney General in Virginia. Commissioner McCormick received a B.A. from the University of Buffalo and a J.D. with honors from the George Mason University (now Antonin Scalia) Law School. She also has attended the William & Mary School of Law.

4. Robert D. Popper has been practicing law for 26 years. He has special knowledge and expertise in the area of voting law. Along with Professor Daniel D. Polsby, he is the co-creator of the "Polsby-Popper" compactness standard, used to measure racial and partisan gerrymandering. In 1995, he represented plaintiffs in a successful constitutional challenge alleging racial segregation in

the design of New York's 12th Congressional District. In 2005, Mr. Popper joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, and in 2008, he was promoted to Deputy Chief. In 2013, he joined Judicial Watch as Director of the Election Integrity Project, in which capacity he litigates voting rights cases. Mr. Popper is a graduate of the University of Pennsylvania and Northwestern Law School.

5. Bradley J. Schlozman served as a Deputy Assistant Attorney General (and Acting Assistant Attorney General) of the Civil Rights Division from 2003-06, where his responsibilities included supervision of the Voting Section. He also later served as U.S. Attorney for the Western District of Missouri from 2006-07. Mr. Schlozman now practices law at the Hinkle Law Firm and frequently represents states and municipalities on a variety of voting rights matters.

6. Hans A. von Spakovsky is a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at the Heritage Foundation, where he concentrates on voting, elections, campaign finance, civil rights, immigration enforcement, and government reform. In 2006-07, he served as a Commissioner of the Federal Election Commission. From 2002-05, he served as Counsel to the Assistant Attorney General for Civil Rights, providing expertise and advice on voting and election issues. The Commission on Federal Election Reform organized by President Jimmy Carter and Secretary James Baker also sought his expertise. Mr. von Spakovsky also has served as a member of the first Board of Advisers of the U.S. Election Assistance Commission, as Vice Chairman of the Fairfax County

Electoral Board in Virginia, as a member of the Fulton County Registration and Election Board in Georgia, and as a member of the Virginia Advisory Board to the U.S. Commission on Civil Rights. Mr. von Spakovsky currently is a Commissioner on the Presidential Commission on Election Integrity. He is a graduate of Vanderbilt University Law School and the Massachusetts Institute of Technology.

During their tenures, *amici* were charged with enforcing the nation's election laws, including the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). *Amici* have a continued interest in the proper interpretation and enforcement of these laws. The Sixth Circuit adopted an interpretation of the NVRA that contradicts how *amici* enforced that statute. In fact, during *amici*'s tenures, the Justice Department negotiated settlement agreements that required localities to do exactly what the Sixth Circuit held was illegal here. The Sixth Circuit's interpretation of the NVRA squarely contradicts this history of enforcement and threatens to undermine the core purposes of the NVRA—ensuring the accuracy of state voter rolls and protecting the integrity of federal elections.

SUMMARY OF ARGUMENT

Amici were once tasked with enforcing the NVRA, part of the "complex superstructure of federal regulation" that "Congress has erected ... atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). The NVRA requires the states to keep their voter rolls up to date. Each state must adopt a program that removes voters from the rolls when they

move to a different jurisdiction. Although a voter cannot be removed solely because he failed to vote, a voter can be removed if the state sends him a notice and he neither responds nor votes in two consecutive federal elections. There are no limits on when the states can send these notices or to whom they can send them; the NVRA says nothing about that.

Or at least that is how *amici* interpreted and enforced the NVRA when they served in the Civil Rights Division of the Justice Department. But the Sixth Circuit, in a 2-1 decision, rejected this settled interpretation. It struck down Ohio's Supplemental Process, which sends individuals an NVRA-compliant notice if they have not engaged in voter activity for two years. The Supplemental Process violates the NVRA, according to the Sixth Circuit, because the "trigger" for the notice is a person's failure to vote.

The Sixth Circuit erred, and its error warrants this Court's correction. The text, structure, and history of the NVRA all point in the same direction: the NVRA requires the states to send notices before removing voters for changing residences. But it does not regulate the "triggers" for those notices. In fact, *amici* helped the Justice Department negotiate settlements with localities in Pennsylvania, Indiana, and Arkansas that required a notice procedure indistinguishable from Ohio's Supplemental Process. The decision below directly contradicts this history of federal enforcement. And it deprives the states of an important tool in combatting bloated voter rolls. "[A]ccurate and current voter registration lists," in turn, "are essential to the integrity of the election process and for the protection

of the individual." H.R. Rep. No. 103-9, at 14 (1993); S. Rep. No. 103-6, at 31 (1993).

ARGUMENT

This Court should reverse the Sixth Circuit for two main reasons. First, the Sixth Circuit's interpretation of the NVRA conflicts with its text, structure, and history. *Amici* have long interpreted the statute oppositely, and they helped the Justice Department negotiate settlements that would be illegal under the Sixth Circuit's view. Second, the Sixth Circuit's decision deprives Ohio and other jurisdictions of an important means to combat bloated voter rolls, a real and pressing threat to the integrity of federal elections.

I. The Sixth Circuit's interpretation of the NVRA is incorrect and contradicts the Justice Department's longstanding enforcement policy.

A. The Sixth Circuit's interpretation of the NVRA conflicts with the law's text, structure, and history.

The NVRA has two main goals: maximizing the number of eligible citizens on the voter rolls and minimizing the number of ineligible citizens on the voter rolls. *See* 52 U.S.C. § 20501(b). To minimize the number of ineligible voters, the NVRA requires states to adopt a "program" that removes registered voters who become ineligible "by reason of ... a change in the[ir] residence." *Id.* § 20507(a)(4)(B).

The NVRA limits how states can remove these now-ineligible voters—two of those limits are relevant here. First, under subsection (b)(2), states cannot adopt a program that "result[s] in the removal of the name of any person ... by reason of the person's failure to vote." *Id.* § 20507(b)(2). Second, under subsection (d), states cannot remove voters without confirming that they actually have changed residences. *See id.* § 20507(d). A state can conclude that a voter changed residences, however, if he "fail[s] to respond to a notice" sent by the state and "has not voted or appeared to vote" in two consecutive federal elections. *Id.* § 20507(d)(1)(B).

At first blush, these limits may seem contradictory. Subsection (b)(2) prohibits states from removing voters "by reason of [their] failure to vote." *Id.* § 20507(b)(2). Yet subsection (d)'s notice procedure allows states to remove voters precisely because they failed to vote in consecutive federal elections. But the NVRA resolves this tension by clarifying that subsection (d)'s notice procedure does *not* "result in the removal of the name of any person ... by reason of the person's failure to vote" for purposes of subsection (b)(2):

> [A state program] shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except* that nothing in this paragraph *may be construed* to prohibit a State from using [subsection (d)'s notice procedure] to remove an individual from the official list of eligible voters if the individual—

> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Id. § 20507(b)(2) (emphases added).

The "except" clause of subsection (b)(2) was added by the HAVA in 2002. In using the word "construed," the except clause does not change the meaning of subsection (b)(2); it clarifies what subsection (b)(2) has always meant. *See Alden v. Maine*, 527 U.S. 706, 722-23 (1999) (explaining that the use of the word "construed" in the Eleventh Amendment means it was enacted "not to change" but to "address[] the proper interpretation of ... the original"). The notice procedure in subsection (d) *never* "result[ed] in the removal of the name of any person ... by reason of the person's failure to vote." Although the failure to vote (in two consecutive elections) is one requirement under the notice procedure, it is the voter's *failure to respond to the notice*—not his failure to vote—that ultimately leads to his removal from the voting rolls.

Another provision of the HAVA makes the same point. Section 21083 expressly incorporates the notice procedure of the NVRA. It explains the notice procedure this way: "[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for

Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). The use of the word "solely" is telling. It confirms that, under the NVRA, a person's failure to vote can be *a* factor in removing him from the voter rolls. It just cannot be the *sole* factor.

This distinction is precisely the one that Congress meant to draw. Both the House and the Senate reports surveyed the state voter-registration policies existing at the time and explained how the NVRA would affect them:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. The "handful" of state programs that "remov[e] registrants from the list simply for not voting" were the ones the NVRA prohibited—not the majority of state programs that first "send a notice to assess whether the person has moved." H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46.

Ohio's Supplemental Process is not among the "handful" of programs the NVRA prohibited. Ohio sends a notice to anyone who fails to engage in any "voter activity" for two years. If the voter does not respond to the notice and does not vote (or appear) in two consecutive federal elections—the two requirements in subsection (d) of the NVRA—Ohio cancels his registration. As Judge Siler recognized, "no voter is removed solely by reason of a failure to vote" under Ohio's Supplemental Process. Pet. App. 35a (Siler, J., dissenting). A voter is removed only if he fails to respond to the notice. And a voter can stay registered by engaging in any kind of voter activity during this four-year period. *See* Pet. 10.

The Sixth Circuit nevertheless held that Ohio's Supplemental Process violates subsection (b)(2) of the NVRA. The Sixth Circuit gave three reasons for reaching this conclusion. None is persuasive.

First, the Sixth Circuit noted that the "trigger" for the notices sent out under the Supplemental Process "is ultimately based 'solely' on a person's failure to vote." Pet. App. 22a (majority opinion). But, as the district court explained, the word "'trigger'" is "nowhere to be found in the NVRA." Pet. App. 56a. The NVRA explains that subsection (d)'s notice procedure complies with subsection (b)(2), and it does not limit "the events that need or need not happen before a state may initiate" that notice procedure. *Id.* at 58a. No matter what trigger a state chooses, the removal of a voter under subsection (d)'s notice procedure is premised on the voter's failure to respond to the notice—not on his failure to vote.

Second, the Sixth Circuit reasoned that, if a state's use of subsection (d)'s notice procedure automatically satisfies subsection (b)(2), then subsection (b)(2) would be reduced to "mere surplusage." *Id.* at 17a. After all, states are *required* to use subsection (d)'s notice procedure before they can remove a voter for changing his residence. *See id.* But this argument fails on multiple levels. For one, subsection (b)(2)'s prohibition on removing a voter solely for his failure to vote retains some "independent meaning" under Ohio's interpretation. *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 148-49 (1998). Unlike subsection (d), subsection (b)(2) is not confined to removal "on the ground that the registrant has changed residence." 52 U.S.C. § 20507(d)(1). No matter the meaning of subsection (d), then, subsection (b)(2) applies fully to the NVRA's other grounds for removal, including criminal conviction, mental incapacity, and death. *See id.* § 20507(a)(3)-(4).

Even in the context of changed residences, moreover, subsection (b)(2) is not superfluous. In the context of change-of-residence removals, subsection (d) and subsection (b)(2) are not two rules but one: together, they prohibit the practice of presuming that a non-voter has changed residences (and dropping him from the voter rolls) without first giving him notice. *See* H.R. Rep. No. 103-9, at 30; S. Rep. No. 103-6, at 46. That Congress explained how this rule works in more than one provision is not surplusage; it is a helpful attempt to clarify how the statute operates. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007). Clarification was important because, as explained, it is not immediately obvious how subsection (b)(2) and subsection (d) coexist in the NVRA. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 n.7

(1994) ("It is no superfluity for Congress to clarify what had been at best unclear ....").

Third, the Sixth Circuit invoked the "traditional rule" that a statute's exceptions should be "construed narrowly." Pet. App. 16a. But this "made-up canon" is illegitimate. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting). The Court has not invoked it consistently, *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 359-63 (2012), and it contradicts important principles of statutory construction, such as "'no legislation pursues its purposes at all costs'" and "[c]ongressional intent is discerned primarily from the statutory text," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)).

In any event, this canon cannot apply to the NVRA. The law serves *dual* purposes: increasing the registration of eligible voters and decreasing the registration of ineligible voters. *See* 52 U.S.C. § 20501(b). It is impossible to tell which purpose is the "general rule" and which purpose is the "exception." For example, the principle that a voter can be removed for failing to respond to a notice is framed as a rule, *see id.* §§ 20507(a)(4)(B); 21083(a)(4)(A), and as an exception, *see id.* § 20507(d)(1)(B). In subsection (b)(2), it is framed neither as a rule nor as an exception, but as a clarification. *Id.* § 20507(b)(2). Put simply, even if a canon that construes exceptions narrowly could ever be applied sensibly, it could not be applied sensibly here.

In sum, the Sixth Circuit's interpretation of the NVRA contradicts the law's text, structure, and history. The NVRA requires the states to remove individuals who

change their residence from the voter rolls. To do so, the NVRA allows the states to remove any individual who does not respond to a notice and does not vote in two consecutive federal elections; and it does not limit when the states can send those notices. Ohio's Supplemental Process follows this procedure. It complies with the NVRA.

B. The Sixth Circuit's decision contradicts the Justice Department's longstanding interpretation of the NVRA.

There is little support for the Sixth Circuit's interpretation of the NVRA. Indeed, *amici* have long taken the opposite view. When they were serving in the Civil Rights Division, the Justice Department *required* states to adopt procedures that are indistinguishable from Ohio's Supplemental Process. The Sixth Circuit's interpretation flouts this well-established history of enforcement.

For example, in 2007, the Justice Department sued the City of Philadelphia for violations of the NVRA, the HAVA, and the Voting Rights Act. *See* Am. Compl., *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2007 WL 1476781 (E.D. Pa. Apr. 26, 2007) [Dkt. No. 35]. With respect to the NVRA, the United States alleged that Philadelphia "fail[ed] to conduct a meaningful general program of voter registration list maintenance" and "d[id] not conduct a program that makes a reasonable effort to remove the names of ineligible voters." *Id.* ¶¶ 55-56. The parties ultimately settled. As part of that settlement, Philadelphia agreed to "send a forwardable confirmation notice to any registered elector who has not voted or appeared to vote during any election" and "remove inactive voters who

fail to appear to vote during the period beginning with the date of the confirmation notice and ending after the second federal general election following the date of the confirmation notice." Settlement Agreement ¶ 16, *United States v. Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Apr. 26, 2007), *available at*, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/phila_settlement.pdf.

The settlement with Philadelphia was not an isolated agreement. During *amici*'s tenures, the Justice Department also negotiated similar agreements with the State of Indiana and Pulaski County, Arkansas. *See* Consent Decree and Order ¶ 4, *United States v. Indiana*, No. 1:06-cv-1000 (S.D. Ind., June 27, 2006) [Dkt. No. 4], *available at*, https://www.justice.gov/crt/consent-decree-and-order; Consent Order ¶¶ 4-8, *United States v. Pulaski County*, No. 4:04-cv-389 (E.D. Ark. Apr. 19, 2004) [Dkt. No. 9], *available at*, https://epic.org/privacy/voting/register/pulaski_cd.html.

All of these agreements required the defendants to adopt a program like Ohio's Supplemental Process. The defendants had to identify a list of nonvoters, send those nonvoters a notice asking them to confirm their address, and cancel the registration of voters who did not respond to the notice and did not vote in two consecutive federal elections. According to the Sixth Circuit, however, these agreements forced the defendants to violate federal law. *Amici* respectfully disagree. Because the Sixth Circuit's interpretation of the NVRA undermines these agreements and impugns this history of federal enforcement, it warrants this Court's reversal.

II. The Sixth Circuit's decision will undermine the states' efforts to maintain accurate voter rolls and to promote the integrity of elections.

Congress enacted the NVRA "to ensure that accurate and current voter registration rolls are maintained" and "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3)-(4). These objectives are complementary. "The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud." S. Rep. No. 103-6, at 18. As this Court has recognized, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud," and "[a] good registration list will ensure that citizens are only registered in one place." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193-94 (2008) (opinion of Stevens, J.) (quoting Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005), https://goo.gl/y3jVi9). "[P]ublic confidence in the integrity of the electoral process," in turn, "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Programs like Ohio's Supplemental Process are an important tool in achieving these goals. Individuals who move to a new jurisdiction are no longer eligible to vote

in their old jurisdiction and should not remain registered there. Although states can track some of these voters through the Postal Service's change-of-address database, that data is underinclusive. Many people who change residences do not use this service. *See* Pet. 33-34. To maintain accurate voter rolls, states need to be able to use other reliable indicia of ineligibility—including a lack of voter activity.

Recent voter registration data justify Ohio's efforts. A 2012 Pew Study found major problems with the accuracy of voter rolls in the United States. According to the study, 24 million voter registrations (one out of every eight) are invalid or inaccurate. For example, 1.8 million deceased persons are listed as voters, and 2.75 million people are registered to vote in more than one state. *See* Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (2012), goo.gl/mQV8Ul. "Inflated voter lists are also caused by phony registrations and efforts to register individuals who are ineligible." *See* Comm'n on Fed. Election Reform, *supra*, at § 2.6. After the 2008 election, the Justice Department "sent letters to a dozen states inquiring about their list maintenance practices" because "there appeared to be significant imbalances between their numbers of registered voters and their citizen populations." U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* 38 (2009), goo.gl/xp7nhc (testimony of Christopher Coates, Acting Chief of the Voting Section). As of 2017, twenty-eight states participate in the Interstate Voter Registration Crosscheck Program (administered by the State of Kansas). This program analyzes the voter rolls of the participating states and identifies individuals

who are registered in more than one state. As of February 2017, the Crosscheck Program revealed hundreds of thousands of voters who were potentially registered in multiple states. Of the twenty-eight participating states analyzed in 2017, the following states had potential voter registration duplications with other participating states:

- Alabama – 239,801
- Arizona – 274,523
- Arkansas – 136,760
- Colorado – 286,035
- Georgia – 660,708
- Idaho – 28,113
- Illinois – 542,065
- Indiana – 516,700
- Iowa – 134, 186
- Kansas – 141,250
- Kentucky – 371,788
- Louisiana – 134,560
- Maine – 76,484

- Massachusetts – 191,734
- Michigan – 418,006
- Mississippi – 181,117
- Missouri – 288,949
- Nebraska – 76,005
- Nevada – 95,249
- New Hampshire – 94,610
- North Carolina – 561,811
- Ohio – 479,083
- Oklahoma – 118,347
- South Carolina – 368,189
- South Dakota – 41,920
- Tennessee – 296,494
- Virginia – 354,452
- West Virginia – 105,725

See Appendix at 1 (Kan. Sec'y of State, *Grid of Potential Duplicate Registrants Within States by DOB* (2017)).

These efforts have led to numerous prosecutions. Using the Crosscheck data, in 2008 and 2010, Kansas referred fourteen instances of double voting for prosecution, and Colorado indicted or referred to the FBI ten instances of double voting. *See* Kris W. Kobach, *Presentation on Interstate Voter Registration Crosscheck Program to Nat'l Ass'n of State Election Directors* (Jan. 26, 2013), goo.gl/FQwRvQ.

Similarly, the Heritage Foundation has identified 938 recent criminal convictions for voter fraud in the United States—many involving false registrations and double voting. *See* Heritage Found., *A Sampling of Election Fraud Cases from Across the Country* (last updated July 2017), https://goo.gl/yNoVdY. Numerous convictions involve individuals who voted in more than one state. For example, Regina Beaupre pleaded guilty in 2015 to voting in the same election in both Arizona and in Michigan. *Id.* at 15. James and Karen Marshall voted in both Arizona and Kansas in 2008. *Id.* at 21. Michael Hannum pleaded guilty to voting in Nebraska and Kansas in 2012. *Id.* at 127. Ron Weems pleaded guilty to voting in both Colorado and Kansas in the 2012 and 2014 elections. *Id.* at 128. Steven Gaedtke was convicted of voting in both Arkansas and Kansas in 2010. *Id.* at 129. Wendy Rosen (a candidate for Congress in Maryland) pleaded guilty to voting in both Florida and Maryland in 2010. *Id.* at 148. Pasco Parker admitted to voting in Florida, North Carolina, and Tennessee in the 2012 general election. *Id.* at 267.

Other individuals were convicted of voting twice in different parts of the same state. In Arizona, eight individuals—David Culberson, Adam Hallin, John Hamrick, Gerald Sack, Steven Streeter, Jay Thompson,

Franklin Turner, and Jeffery Hitchcock—pleaded guilty to attempted double voting in the 2012 general election. *Id.* at 11-15. In New Hampshire, Derek Castonguay pleaded guilty to voting in Salem and Windham in the 2014 election. *Id.* at 242. In Wisconsin, Todd Murray was convicted of voting in both New Berlin and West Allis in the 2012 election. *Id.* at 362.

Still other individuals cast ballots on behalf of deceased relatives who were not removed from state voter rolls. In California, Mark Evans cast a ballot in the name of his deceased father-in-law. *Id.* at 25. In Oregon, Lafayette Keaton pleaded guilty to casting multiple ballots using his deceased son's and brother's identities. *Id.* at 291.

The Government Accountability Institute ("GAI") also has identified numerous potential duplicate voters. *See America The Vulnerable: The Problem of Duplicate Voting*, Government Accountability Institute (2017), https://goo.gl/Mmqk6d. The GAI obtained and compared voter history and registration data from 21 states, representing 17 percent of the possible state-to-state comparison combinations. *Id.* at 2-3. The comparison included names, birthdates, and social security numbers. *Id.* at 3. It found 8,471 "highly likely" duplicate voters in the 2016 election—individuals who illegally voted in more than one state. *Id.* GAI estimated that extending its very conservative matching method to include all 50 states would indicate an expected minimum of 45,000 high-confidence duplicate voters. *Id.* at 3. The Institute also identified more than 15,000 voters registered at prohibited addresses including "post office boxes, UPS stores, federal post offices, and public buildings." *Id.* In one case, it found more than 100 voters registered at the same

UPS store and it found other voters whose registered home addresses matched the addresses of gas stations, vacant lots, abandoned mill buildings, basketball courts, parks, warehouses, and office buildings. *Id.* at 18-19.

Accurate voter rolls are vital in the effort to combat voter fraud. Bloated rolls "create[] a potential for people to fraudulently vote under the names of these illegally registered individuals." U.S. Comm'n on Civil Rights, *supra*, at 12 (executive summary of Coates's testimony). Efforts like Ohio's Supplemental Process not only comply with the NVRA; they are essential to achieving its purposes.

CONCLUSION

For all these reasons, this Court should reverse the Sixth Circuit's decision.

Respectfully submitted,

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

August 7, 2017

Counsel for Amici Curiae

APPENDIX

APPENDIX — GRID OF POTENTIAL DUPLICATE REGISTRANTS WITHIN STATES BY DOB

[FOLDOUT]

2017

	Number of Voters	Invalid or Null Votes or Blanks	Voter Turnout Rate	Voter Not Voted Rate	Age Unknown	Voters with more than 1 vote	Overlap Rate Last 4	Out of Potential Duplicate Registrants Within States by Both Last Name Variation																										COMPARED TO 47 states
								AL	AZ	AR	CO	GA	ID	IL	IN	IA	KS	KY	LA	ME	MA	MI	MS	MO	NE	NV	NH	NC	OH	OK	SC	SD	TN	VA	WV	
	3,253,448	271	48	81	0	6,224	5,458		4,366	4,264	5,689	89,043	926	11,116	9,918	1,961	2,270	11,120	8,730	1,022	2,805	16,707	28,514	6,653	1,151	1,883	787	14,513	10,797	3,054	89,873	587	17,683	9,924	1,961	338,80
	4,074,389	1	61	64	0	14,038	4,095	4,366		4,534	32,634	16,189	3,630	32,041	20,848	8,678	5,568	9,317	3,021	2,007	5,805	27,943	3,181	10,382	4,881	15,308	3,703	13,648	12,549	6,103	9,123	4,897	9,464	9,478	2,906	374,62
	1,772,059	45	72	197	0	2,406	3	4,264	4,534		5,709	9,971	487	8,768	6,328	2,355	4,488	5,014	7,071	597	1,541	5,886	8,395	15,954	1,473	1,671	681	6,566	5,510	13,155	3,645	688	6,847	3,870	1,048	138,76
	3,680,466	0	3	61	3,795	4,802	621	5,689	30,634	5,709		21,158	2,894	25,009	17,121	8,158	12,736	6,387	5,550	3,547	8,027	18,105	3,612	13,448	3,835	7,524	3,144	18,236	15,602	9,825	7,870	5,049	7,431	13,196	2,925	288,63
	5,727,010	0	22	16	0	10,602	17	89,043	10,199	9,971	21,158		1,709	38,129	30,717	5,341	7,219	26,055	16,323	3,805	13,704	33,364	23,158	16,588	3,316	7,283	3,330	64,137	38,395	6,340	13,216	1,613	47,631	46,769	6,268	648,73
	787,534	0	18	83	3	124	171	926	3,630	487	2,894	1,709		1,678	1,490	626	688	983	384	299	492	1,349	395	955	371	1,807	267	1,428	1,365	608	785	427	884	1,587	267	28,11
	6,568,141	53,365	123	104	3	62,861	0	11,116	32,041	8,768	25,009	38,129	1,678		58,553	33,666	7,166	21,826	6,980	2,620	11,597	51,780	11,765	30,575	4,778	8,994	2,466	21,213	34,709	9,613	12,083	1,887	18,529	15,671	2,910	542,00
	4,938,512	3,437	62	208	22,511	28,631	3,698	6,913	20,545	6,323	17,131	30,717	1,490	58,553		7,430	9,436	12,830	5,561	1,837	8,009	56,361	7,554	18,477	2,776	5,169	1,852	24,088	57,189	6,697	15,635	1,600	19,111	14,630	4,054	515,49
	3,120,850	1	18	23	6	470	105	1,881	8,570	2,313	6,108	6,341	634	33,666	7,430		4,270	3,139	1,346	611	1,537	5,938	1,653	10,139	11,071	1,496	481	4,817	4,816	1,892	2,383	5,305	2,941	3,263	622	124,18
	1,795,864	6	15	108	8	784	318	2,215	5,840	4,458	12,724	7,273	688	7,186	5,450	4,270		3,241	1,703	837	1,443	4,427	1,036	39,001	8,440	1,883	488	5,145	4,828	10,517	2,740	1,548	2,082	3,572	602	141,25
	3,113,879	0	113	62	0	4,583	2	11,120	8,317	5,614	8,387	28,055	683	21,826	12,830	3,139	3,241		4,166	1,556	3,861	10,106	6,299	10,736	1,554	2,838	1,286	21,486	64,777	3,868	12,037	877	33,997	13,998	8,126	374,79
	2,976,391	0	2	2	43,221	783	0	6,730	3,923	7,071	5,501	18,332	364	6,886	5,581	1,349	1,709	4,166		805	2,305	5,009	21,700	5,013	640	1,519	658	9,571	5,810	3,004	3,878	353	6,071	4,382	1,177	34,88
	1,052,819	0	2	5	0	2,286	28	1,022	2,902	657	3,541	3,801	289	2,620	1,937	615	837	1,556	805		18,881	2,558	628	1,271	373	696	13,370	5,281	2,944	861	3,068	790	1,570	4,277	589	75,48
	4,461,777	112	48	27	0	2,102	28	2,095	5,309	1,341	8,021	13,734	493	11,087	8,009	5,557	1,643	3,287	2,181	18,881		10,256	1,450	4,847	877	2,079	40,364	15,687	9,980	1,826	7,736	452	3,636	14,482	1,239	191,79
	7,413,681	4	8	2	0	49,163	1	10,707	27,943	8,896	16,105	33,264	1,348	51,780	36,751	5,536	4,421	19,105	5,988	2,838	10,256		7,713	13,546	2,000	6,286	7,071	27,036	72,497	4,947	13,378	1,971	17,365	15,436	3,643	418,00
	2,362,809	392	382	238	19,561	25,946	150	20,514	3,181	6,296	3,017	23,130	388	11,765	7,555	1,635	1,599	6,299	21,700	609	1,450	7,713		6,813	952	1,884	471	8,838	6,557	2,036	5,166	456	21,336	5,739	1,230	191,11
	4,137,548	4	54	832	0	5,078	11,219	8,035	17,569	15,664	13,443	10,585	855	52,575	19,473	10,130	19,081	18,736	5,038	1,271	4,047	11,545	5,413		5,523	3,221	1,071	11,095	12,130	9,403	6,175	1,733	8,813	9,457	1,815	268,94
	1,215,139	1	18	62	0	668	8	1,101	4,897	1,423	5,035	5,516	321	4,778	2,774	11,971	5,445	1,581	644	372	877	2,850	952	5,523		1,208	274	3,654	2,911	1,548	1,529	3,088	1,357	1,945	444	78,95
	1,819,727	27	179	121	0	733	2	1,563	15,168	1,677	7,525	7,202	1,807	8,564	5,165	1,498	1,883	2,681	1,536	496	2,098	6,295	1,564	3,225	1,208		685	4,882	6,103	1,548	3,434	981	2,279	5,287	698	81,39
	901,639	0	41	11	0	1,414	118	787	2,709	467	1,144	3,358	263	2,486	1,853	467	486	1,201	616	13,376	40,364	2,031	471	1,071	274	696		5,481	2,612	563	3,443	181	1,314	4,232	491	84,61
	5,745,418	0	7	16	525,547	14,617	0	14,513	13,649	8,552	18,239	84,157	1,428	25,215	24,928	4,617	5,149	21,484	6,571	5,287	15,681	27,008	6,883	11,088	2,634	4,887	5,481		34,995	5,917	102,194	1,515	22,884	74,452	12,957	881,81
	7,858,276	0	5	21	0	8,990	1	10,787	17,645	5,518	10,882	39,380	1,301	34,705	97,100	4,010	4,020	64,771	5,613	2,844	9,186	52,491	9,557	12,130	2,611	5,102	2,612	34,995		8,544	20,811	1,099	17,070	20,758	20,928	479,39
	2,151,141	64	142	515	0	3,911	36	3,013	9,103	12,119	9,629	8,345	698	5,813	5,537	1,686	10,817	3,869	3,034	641	1,535	4,847	2,823	9,403	1,546	1,648	502	5,972	5,564		3,882	803	3,953	4,096	1,116	106,34
	3,265,337	0	0	157	65	5,833	3,029	10,873	8,123	3,645	7,029	16,216	709	12,063	15,576	2,353	2,748	12,633	3,815	3,768	7,706	13,378	5,166	6,379	1,528	2,454	3,443	102,104	20,611	3,093		913	12,328	21,705	1,543	168,18
	588,216	0	11	14	12	134	12	564	4,803	698	9,568	1,613	427	1,997	1,808	1,351	1,548	877	353	265	437	1,973	456	1,733	3,849	981	197	1,512	1,598	801	512		829	1,166	296	41,82
	3,858,716	258	45	91	5	4,810	2,587	17,052	9,464	8,847	7,435	47,031	684	18,626	18,113	2,541	3,663	10,691	5,071	1,670	3,829	11,888	21,325	8,602	1,353	2,270	1,314	32,284	17,979	3,551	12,338	823		13,054	3,310	288,48
	3,679,184	0	6	18	0	3,325	31	6,824	9,818	3,870	13,156	48,697	1,397	19,871	14,909	3,382	3,512	13,652	4,582	4,277	14,412	15,436	5,730	8,48	1,970	3,287	4,232	74,452	20,754	4,565	21,705	1,196	13,054		16,453	354,45
	1,239,953	0	53	24	0	3,712	1,366	5,857	7,098	1,018	2,529	8,268	293	2,985	4,064	681	830	5,305	1,171	581	1,215	3,697	1,250	1,816	444	638	457	12,953	20,978	1,168	7,943	259	3,310	16,453		179,12
	99,243,362							215,80	278,023	138,700	288,206	680,708	28,613	542,085	518,700	156,189	161,250	371,488	134,969	10,604	181,734	418,096	151,117	208,840	18,000	68,240	64,010	981,81	478,083	118,867	368,189	47,820	366,484	356,452	100,731	

Creative 28